IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

FIRSTAR FIBER V. KARL W. SCHMIDT & ASSOCS.

FIRSTAR FIBER, INC., APPELLANT,
V.
KARL W. SCHMIDT & ASSOCIATES, INC., APPELLEE.

Filed March 16, 2010. No. A-08-1315.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Alan E. Pedersen, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., for appellant.

L. Steven Grasz, of Husch, Blackwell & Sanders, L.L.P., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

I. INTRODUCTION

Firstar Fiber, Inc. (Firstar), filed a complaint against Karl W. Schmidt & Associates, Inc. (KWS), alleging that KWS failed to deliver equipment in full compliance with two contracts between the parties and that the equipment which was delivered breached express and implied warranties pursuant to the Nebraska Uniform Commercial Code (UCC). KWS filed a counterclaim to recover the unpaid balance on Firstar's account.

Following a trial, the jury returned a verdict finding that KWS breached one of the contracts, but did not breach any warranties on either contract and also that Firstar breached one of the contracts. The jury verdict form did not contain specific findings relative to the breach of warranty claims. The jury awarded damages to KWS for the amount Firstar owed on its account to KWS less damages to Firstar for KWS' breach of the one contract. After the trial, Firstar moved the trial court for a new trial and KWS moved for an award of attorney fees. The court denied Firstar's motion for a new trial and awarded KWS $197,410.35 in attorney fees. Firstar now appeals.

II. BACKGROUND

In 2004, Firstar submitted a bid to the city of Omaha (City) to provide the City's recycling services and Firstar was awarded the contract. The recycling operations were to commence on January 2, 2006. The City required Firstar to obtain a payment and performance bond which Firstar obtained from North American Special Insurance Company (NASIC).

In 2005, Firstar began to purchase equipment to build a complete single-stream recycling system for its material recovery facility (facility) in preparation to perform under its contract with the City. Two of the components of Firstar's facility are (1) a recycling sorting system which includes conveyors to move and meter the recyclable material and mechanized screens for sorting the various recyclable products and (2) a baler line, which also includes conveyors, which bales the sorted recyclable material. KWS and Firstar entered into two contracts which the parties and we refer to as the "Baler Line Conveyor Contract" and the "Recycling Equipment Contract."

The Baler Line Conveyor Contract was executed on April 26, 2005, and provided that KWS would supply two conveyors for the baler line conveyor component of the system. The Recycling Equipment Contract was executed on or about August 11, 2005. Pursuant to this contract, KWS would provide certain conveyors, platforms, and controllers to be used as part of the recycling sorting system. The price of the equipment under the Recycling Equipment Contract was $608,611 to be paid according to the payment schedule outlined in the contract.

The equipment was ultimately delivered by KWS to Firstar, and a third party installed the equipment. Various problems arose thereafter with regard to the operation of the complete recycling system. Firstar has paid the Baler Line Conveyor Contract price in full. Firstar made most of the payments under the Recycling Equipment Contract, but withheld certain payments due KWS under this contract.

On December 1, 2006, Firstar filed the present action against KWS alleging breach of the Recycling Equipment Contract. Firstar alleged that KWS did not meet the schedule for delivery which required delivery of the equipment in installments on specific dates in October and November 2005. KWS did not make the final delivery until December 3, 2005, and Firstar alleged that the late delivery caused Firstar to incur additional expenses related to installation of the recycling system. Firstar also alleged that KWS did not deliver all of the required equipment, the equipment was delivered in sections rather than as a complete unit as required by the contract, the equipment was delivered without instructions for proper installation, the equipment could not be properly integrated with equipment bought from other suppliers as part of the recycling system, and KWS failed to work with Firstar to address these problems. Firstar asserted that due to KWS' breach, Firstar withheld the final payment of $81,722.30 owed under the contract. Firstar alleged that it suffered damages from the delayed delivery of the equipment which delayed the installation and operation of the recycling center, additional costs to install the equipment, increased labor and material costs due to the KWS equipment deficiencies, decreased output and productivity due to KWS equipment deficiencies, and decreased sales of recycled products due to KWS equipment deficiencies. Firstar later amended its complaint to add claims for relief for breach of warranty, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability with regard to the Recycling Equipment Contract,

claims for breach of the Baler Line Conveyor Contract and breach of warranty, breach of implied warranty of fitness for a particular purpose, and breach of implied warranty of merchantability on that contract.

KWS answered Firstar's complaint and filed a counterclaim against Firstar and a third-party complaint against Firstar's bonding company, NASIC. KWS denied that it had breached the contracts with Firstar and asserted that Firstar had failed to pay $97,000, not $81,722.30 as alleged by Firstar. KWS also denied that it had offered an express warranty, and denied breach of any implied warranty of fitness for a particular purpose or merchantability. KWS' counterclaim alleged that Firstar had breached the contract by failing to pay for equipment and services provided under the contract or alternatively that Firstar had been unjustly enriched by the equipment and services provided by KWS. KWS sought damages of at least $97,000. KWS alleged additional counts of replevin and conversion. KWS' third-party complaint against NASIC sought, pursuant to NASIC's performance, payment, and guarantee bond, the $97,000 that Firstar had not paid.

On August 18, 2008, the 5-day jury trial began, and a considerable record was created during the trial. While we have considered all of the evidence, we discuss only the evidence which is the most pertinent to the issues presented for our resolution. And, given our standard of review concerning the jury verdict, we outline the evidence that was most favorable to KWS.

Significant evidence was adduced regarding the negotiations between KWS and Firstar relative to the Recycling Equipment Contract, particularly as it related to KWS' attempt to contract with Firstar for sale of a complete recycling sorting system as opposed to a portion of the component parts. Firstar also entered into discussions with another company, Bulk Handling Systems (BHS), which offered to supply a complete recycling sorting system to Firstar. BHS was opposed to Firstar's use of multiple manufacturers to construct the complete recycling sorting system and initially would not agree to sell any component parts to Firstar; it would only supply a complete system. BHS later agreed to provide the mechanized screens for the Firstar system even though the complete system would include components from other suppliers.

Prior to entering into the Recycling Equipment Contract, the KWS sales manager worked extensively with Firstar's project manager to compile an acceptable KWS system for Firstar's complete recycling sorting system. Firstar requested changes in KWS' proposed equipment and system layout. Firstar disregarded KWS' recommendations with regard to the equipment and layout. Although KWS disagreed with the layout proposed by Firstar, KWS followed Firstar's requests in configuring its proposed complete recycling sorting system. On August 10, 2005, KWS submitted its proposed contract for a complete system, which included providing the mechanized screens from BHS at a marked-up price. Firstar rejected KWS' proposal to provide a complete system. On the same day, KWS provided a letter to Firstar that made representations regarding KWS' experience in the industry and regarding the remaining system components that it offered to sell to Firstar. The contract which the parties executed the following day, August 11, was not for the complete recycling sorting system; rather, it was for component parts, including conveyors, platforms, and controllers. Additional items of equipment that KWS offered to sell to Firstar were rejected by Firstar. Firstar also declined the offer by KWS to provide a factory installation supervisor. In addition, Firstar chose to purchase the mechanized screens directly from BHS.

KWS representatives informed Firstar that if Firstar were to purchase an entire recycling system from KWS, KWS would assume system responsibility. However, KWS would not assume responsibility for the entire system if it were only providing component parts for the system, nor would KWS provide blueprints for the complete system. Evidence was presented that the industry standard is that a company would not take responsibility for a system that is pieced together using component parts from different suppliers and similarly would not provide blueprint drawings unless it was supplying the complete system. According to KWS, assuming system responsibility would include ensuring that the entire system is integrated and works together properly, installing, troubleshooting, training as to how to properly operate the system, and completing the punch list--a list of items that were defective or otherwise needed attention after installation.

Firstar hired Heavey Company (Heavey), a company which installs, removes, and relocates industrial machinery, to install the equipment at Firstar's Omaha facility. Heavey was to install the various pieces of equipment from KWS based on a set schedule of when the certain pieces of equipment would be delivered over a 4-week timeframe; however, the delivery schedule was delayed several times which resulted in increased cost to Firstar.

Firstar presented evidence regarding the problems it encountered with the KWS equipment, which problems included missing or inadequate guards to cover the moving mechanical devices on parts of the machines, and some equipment which arrived not fully assembled which delayed installation. In addition, Firstar asserted that various pieces of equipment that Firstar contracted to provide were never shipped; that the equipment drawings, reports, and operating manuals were inaccurate or incomplete; and that the system did not produce at the expected production level.

Firstar began testing the equipment in mid-December 2005. From January through May 2006, Firstar had regular contact with KWS regarding the deficiencies in the system and some progress was made in remedying some of those deficiencies. In addition, KWS did replace certain equipment that was covered under the warranty contained in the terms and conditions of the contract. However, Firstar presented evidence indicating that not all of the problems and deficiencies with the system were corrected by KWS as requested by Firstar.

Several expert witnesses testified for Firstar. These witnesses testified about various deficiencies in the recycling sorting system that negatively affected the system's productivity, including the size and angle of certain conveyors as well as the size of certain work areas in the facility. One expert discussed problems with the equipment installation. Another expert indicated that the contract with KWS did not include many of the items that he would expect to see in a system and that he would have recommended that Firstar buy some of the equipment that KWS offered but which Firstar declined to purchase. This witness also opined that the conveyors' speed and operation were not properly designed or integrated.

The jury found that KWS had not breached the Baler Line Conveyor Contract and had not breached any express or implied warranty with respect to that contract. The jury found that KWS had breached the Recycling Equipment Contract resulting in damages of $1,500, but that it had not breached any express or implied warranty related to that contract. With respect to KWS' counterclaim for breach of contract, the jury found for KWS in the amount of the unpaid account balance of $97,000. Based on the jury's verdict, the district court entered judgment in favor of

KWS and against Firstar and NASIC in the amount of $95,500. The court denied Firstar's subsequent motion for a new trial and sustained KWS' motion for attorney fees, awarding fees in the amount of $197,410.35. Firstar now appeals.

III. ASSIGNMENTS OF ERROR

Firstar asserts, consolidated and restated, that (1) the evidence did not support the jury's verdict with regard to breach of the contracts, breach of express and implied warranties, and damages; (2) the jury awarded excessive damages to KWS; and (3) the trial court erred when it instructed the jury, denied Firstar's motion for a new trial, and awarded attorney fees to KWS.

IV. ANALYSIS

1. BREACH OF CONTRACTS

Firstar assigns as error the jury's finding that Firstar did not meet its burden of proving that KWS breached the Baler Line Conveyor Contract and with regard to the Recycling Equipment Contract that "KWS failed to offer sufficient evidence to prove that it had fully performed its obligations under its contract with Firstar . . . ."

A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 756 N.W.2d 299 (2008). In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidentiary conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Id*. It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Id*. A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000).

(a) Recycling Equipment Contract

The jury found that both parties had breached the Recycling Equipment Contract, entering judgment in full for KWS on its counterclaim regarding the payment withheld by Firstar and entering judgment for Firstar in the sum of $1,500. The record supports the jury verdict with respect to the Recycling Equipment Contract.

The record shows that Firstar purchased equipment for its facility from several suppliers, including KWS. Firstar acknowledges that KWS proposed to sell Firstar a complete recycling sorting system, but Firstar elected to instead purchase components for the system from various suppliers. Firstar's Recycling Equipment Contract with KWS provides that KWS would supply numerous conveyors, platforms, and controllers, which KWS did in fact supply. Firstar claimed that the KWS equipment did not integrate properly into a complete recycling system. However, there was extensive testimony that KWS would take responsibility for integrating the system only if Firstar were to purchase a complete recycling sorting system from KWS. Evidence was adduced regarding the industry standard, which is that a company would not take responsibility for a system that is pieced together using component parts from different suppliers. Firstar

acknowledged that it did not purchase the complete system from KWS; rather, it decided to purchase some pieces of equipment and not others. Firstar also contracted with a separate company to install the equipment and declined KWS' proposal to provide a KWS installation supervisor. Finally, the record supports that KWS suggested alterations to the system to avoid some of the deficiencies about which Firstar complains; however, Firstar rejected those suggestions and ordered KWS to comply with the layout Firstar provided to KWS. Thus, the record supports the conclusion that KWS did not breach the contract, at least to the extent alleged by Firstar.

Firstar admits that it withheld payment on the Recycling Equipment Contract, but essentially contends that it withheld payment to cover its own damages due to KWS' breach of the contract by failing to supply integrated equipment in accordance with the Recycling Equipment Contract. The jury apparently rejected this argument by finding that Firstar breached the contract by its failure to pay the remaining sums due, and we cannot say that this conclusion is clearly wrong. The jury did find that KWS breached the contract in some fashion, awarding Firstar damages in the sum of $1,500. We conclude that there is competent evidence to support the jury's verdict regarding the parties' breaches of the Recycling Equipment Contract.

(b) Baler Line Conveyor Contract

Firstar also challenges the jury's finding that Firstar did not meet its burden of proving that KWS breached the Baler Line Conveyor Contract. Firstar argues that "[b]ased upon the weight of the evidence at trial, the jury erred [in] determining that KWS had not breached the Baler Line Conveyor Contract." Brief for appellant at 31. We reiterate that we will not set aside a jury verdict where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000). Instead, we consider the evidence most favorably to KWS and resolve evidential conflicts in favor of KWS as does the jury, as the trier of fact, which resolves conflicts in the evidence and determines the weight and credibility to be given to the testimony of the witnesses. See *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 756 N.W.2d 299 (2008).

Firstar argues that it presented substantial evidence to show that KWS breached its obligations to Firstar under the Baler Line Conveyor Contract in several ways. Firstar's brief does not, however, include factual citations to the record to support the failures and deficiencies that it attributes to KWS relative to this contract. Court rules clearly require that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief; the failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist. Neb. Ct. R. App. P. § 2-109(D)(1)(f) and (g) (rev. 2008); *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). The record in this case is particularly voluminous, and it is not our function to scour the record for specific facts to support an appellant's claimed errors in an effort to remedy appellant's disregard for court rules.

Nevertheless, we have reviewed the record and are satisfied that competent evidence supports the jury's verdict that KWS did not breach the Baler Line Conveyor Contract. The contract states that KWS would supply two conveyors and certain equipment related to them.

Firstar does not appear to dispute that the equipment was delivered, but, rather, argues that the conveyors were not timely delivered or integrated into the baling system to Firstar's satisfaction. The jury apparently rejected this argument, and we find no clear error in the jury's verdict.

2. Breach of Express Warranties

Next, Firstar asserts that the jury erred in finding in favor of KWS on the express warranty claim because KWS did not effectively disclaim or comply with the express warranties it made.

Whether or not an express warranty arises under the UCC and whether express or implied warranties are breached are questions of fact to be determined by the trier of fact. See *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990) (creation of express warranty); *Ruskamp v. Hog Builders, Inc*., 192 Neb. 168, 219 N.W.2d 750 (1974) (whether there has been breach of warranty, express or implied, is largely question of fact). The factual findings of the trier of fact in a case arising under the UCC will not be set aside unless clearly wrong. See *Hillcrest Country Club v. N.D. Judds Co., supra*.

Pursuant to the UCC, a seller creates an express warranty to which the goods must conform by (1) making any affirmation of fact or promise which relates to the goods and becomes part of the basis of the bargain, (2) stating any description of the goods which is made part of the basis of the bargain, or (3) showing any sample or model which is made part of the basis of the bargain. See Neb. U.C.C. § 2-313(1) (Reissue 2001). It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. § 2-313(2). The existence and scope of an express warranty under the UCC are ordinarily questions to be determined by the trier of fact. *Hillcrest Country Club v. N.D. Judds Co., supra*.

Firstar asserts that KWS expressly warranted the recycling equipment through representations contained in the August 10, 2005, letter, which made representations regarding KWS' experience in the industry and the remaining components that it offered to sell to Firstar. Although Firstar refers to the letter as a warranty letter, the KWS representative who drafted the letter testified that it was not a warranty letter, but, rather, an attempt by KWS to retain Firstar's business and provide the remaining component parts that Firstar needed to complete its recycling system. To that end, the letter included specifications for the remaining system components that KWS proposed to supply as well as specifications, as provided by BHS, regarding the mechanized screens Firstar purchased from BHS.

Firstar presented the argument and evidence regarding the August 10, 2005, letter to the jury, which returned a verdict in favor of KWS. There is competent evidence in the record to support a finding that any representations made by KWS in connection with its contract negotiations with Firstar for the recycling equipment did not become the basis of the bargain as Firstar rejected KWS' offer to sell Firstar a complete recycling sorting system and to be responsible for system integration. Further, the jury had evidence before it upon which it could conclude that statements in the letter in question were merely proposals as opposed to

affirmations of fact or promise and were KWS' opinion or commendation of its goods as opposed to a warranty. Finding no clear error, we do not disturb the jury's verdict.

3. Implied Warranty of Merchantability

Firstar next asserts that KWS breached the implied warranty of merchantability.

The UCC provides that a contract for a sale of goods includes a warranty that the goods shall be merchantable if the seller is a merchant with respect to goods of that kind. "Goods to be merchantable must be at least such as . . . pass without objection in the trade under the contract description [and] are fit for the ordinary purposes for which such goods are used . . . ." Neb. U.C.C. § 2-314(1) and (2) (Reissue 2001). Whether there was a breach of implied warranty of merchantability is a factual question for jury determination. *Adams v. American Cyanamid Co.*, 1 Neb. App. 337, 498 N.W.2d 577 (1992). Factual findings in a case arising under the UCC will not be set aside unless clearly wrong. See *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990).

Firstar contends that KWS breached the implied warranty of merchantability related to the Recycling Equipment Contract because the recycling sorting system does not produce at the expected capacity. With regard to the Baler Line Conveyor Contract, Firstar asserts that the warranty was breached because the controllers were not designed and implemented as necessary to properly integrate the conveyors into the baler line and because certain equipment did not function properly or was not designed and fabricated properly. However, to establish a breach of the implied warranty of merchantability, there must be proof that there was deviation from the standard of merchantability at the time of sale and that the deviation caused plaintiff's injury. § 2-314; *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985). Firstar does not point to, and our review of the record reveals no evidence of, either the standard of merchantability for the equipment at issue here or the deviation from that standard which caused injury to Firstar. Accordingly, we find no clear error in the jury's verdict.

4. Breach of Implied Warranty of Fitness for Particular Purpose

Firstar next asserts that KWS breached the implied warranty of fitness for a particular purpose.

In order to recover for a breach of an implied warranty of fitness under the UCC, the purchaser must prove that (1) the seller had reason to know of the buyer's particular purpose, (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer, in fact, relied upon the seller's skill or judgment. Neb. U.C.C. § 2-315 (Reissue 2001); *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co., supra*. Liability for breach of implied warranty of fitness for a particular purpose under the UCC lies only when goods do not fulfill the specific need for which they were purchased, and not when goods in question are defective per se or fail to meet their ordinary purpose. § 2-315; *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997). Whether an implied warranty has been breached is largely a question of fact which will not be set aside unless clearly wrong. See *Ruskamp v. Hog Builders, Inc.*, 192 Neb. 168, 219 N.W.2d 750 (1974); *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990).

Firstar contends that it relied on KWS' representations with regard to selecting the appropriate equipment in order to fulfill Firstar's specific needs and purposes. However, there is evidence upon which the jury could have found that Firstar did not rely upon KWS' skill or judgment in selecting the equipment as Firstar rejected several recommendations made by KWS regarding equipment, layout, and installation. Accordingly, we find no clear error in the jury's verdict in favor of KWS with regard to an implied warranty of fitness for a particular purpose.

5. JURY INSTRUCTIONS

Firstar asserts that the trial court erred when it submitted jury instruction 14A over Firstar's objection. Jury instruction 14A states: "Several exhibits have been received into evidence detailing the damage claims asserted by Firstar. These exhibits, numbered 426 through 430[,] are demonstrative of the testimony given by [certain Firstar] witnesses . . . and have been received for that limited purpose."

Firstar offered each of these exhibits, which were prepared by Firstar's project manager using company records; the project manager contemporaneously testified to the information contained in each exhibit. Exhibit 426 is a punch list detailing the items which did not function according to Firstar's expectations and which Firstar wanted KWS to repair; the punch list included the repair cost that Firstar estimated for each list item. Exhibit 427 is a document estimating the downtime and related costs that occurred due to controller and conveyor issues. Exhibit 428 is a compilation of the contractors Firstar hired to fix certain deficiencies and the cost associated with each repair project. Exhibit 429 is a compilation of approximately 2 years of the facility's monthly production as compared with the production Firstar expected if the system had been functioning at Firstar's desired production rate. Exhibit 430 calculates the Firstar's overtime hours during the first 2 years of operation. The court received each of these exhibits over KWS' objection. Following the reception of exhibits 429 and 430, the court instructed the jury that these exhibits set forth a summary of Firstar's claims and assertions and that the exhibits were demonstrative of Firstar's project manager's testimony.

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

Firstar argues that the "limiting instruction caused the jurors to improperly discredit or discount said exhibits which should have been admitted without any limiting instruction as memoranda prepared by [a] Firstar witness . . . utilizing business records maintained in the ordinary course of business by Firstar." Brief for appellant at 43. We find no error in the instruction given by the court as it correctly informed the court that the exhibits were demonstrative of the testimony of the witnesses concerning Firstar's damages. The exhibits in question were compilations of information contained in Firstar's business records to summarize Firstar's damages, as described by the testimony of the project manager. Demonstrative exhibits may be used to supplement the witness' spoken description of the transpired event. See *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d (1997). Further, Firstar has not shown that jury instruction 14A was prejudicial or otherwise adversely affected a substantial right of Firstar. The jury heard the extensive testimony of Firstar's project manager about each of these exhibits and

had the exhibits before it in considering what damages, if any, Firstar had incurred. As such, we conclude that Firstar has not met its burden of proof with respect to this assignment of error.

6. DAMAGES

Firstar also assigns as error the jury's damage award. The amount of damages is a matter solely for the fact finder, whose decision will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000). An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Id.*

Firstar essentially asserts that the jury's award of $97,000 for the full amount that KWS claimed was due under the Recycling Equipment Contract was excessive and that the jury failed to properly consider damages that should have been awarded to Firstar due to KWS' breach. We have previously found that there was competent evidence to support the jury's findings that Firstar breached the contract because it withheld payment on the contract and that KWS did not breach the contract to the full extent alleged by Firstar.

Firstar also asserts that the $1,500 damage award was "inadequate as it was against the weight and reasonableness of the evidence at trial and extremely disproportionate to the damages actually suffered by Firstar." Brief for appellant at 27-28. Firstar does not argue or point to any evidence which suggests that the alleged inadequate damages award is the result of passion, prejudice, mistake, or some other means not apparent in the record. KWS acknowledges in its brief that while the precise evidence on which the jury based its $1,500 damage award to Firstar is not discernible, the record supports that award. Because KWS does not dispute the award and Firstar cites no evidence to support its claim that the award is inadequate, we do not disturb the jury's damage award.

7. NEW TRIAL MOTION

Firstar asserts that the trial court erred in overruling its motion for a new trial. Firstar argues that the trial court abused its discretion when it denied the new trial motion for the same reasons that Firstar now assigns as error on appeal, namely, because KWS failed to offer sufficient evidence to prove its damages, excessive damages were awarded to KWS, and the trial court erred when it submitted jury instruction 14A over Firstar's objection.

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

We have considered above the same arguments that Firstar asserts in support of this assignment of error and found them to be without merit. Accordingly, we find no abuse of discretion, and this assignment of error is also without merit.

8. ATTORNEY FEES

Firstar finally asserts that the trial court erred in awarding attorney fees to KWS in the amount of $197,410.35 pursuant to Neb. Rev. Stat. § 44-359 (Reissue 2004).

A trial court's award of attorney fees and the amount of the fee awarded is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Young v. Midwest Fam. Mut. Ins. Co.*, 276 Neb. 206, 753 N.W.2d 778 (2008).

Section 44-359 provides that a party who is the beneficiary of an insurance policy, upon entry of a judgment against the company, may recover a reasonable sum as an attorney fee in addition to the amount of the award. Section 44-359 has been applied to claims against a surety, and Firstar does not argue that it was erroneously applied. See *Omaha Home for Boys v. Stitt Constr. Co., Inc.*, 195 Neb. 422, 238 N.W.2d 470 (1976); *School Dist. No. 65R v. Universal Surety Co.*, 178 Neb. 746, 135 N.W.2d 232 (1965).

An attorney fee awarded under the provisions of § 44-359 must be solely and only for services actually rendered in the preparation and trial of the litigation on the policy in question. *Young v. Midwest Fam. Mut. Ins. Co., supra*. To determine proper and reasonable attorney fees under § 44-359, it is necessary to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services; there is no presumption of reasonableness placed on the amount offered by the party requesting fees. *Young v. Midwest Fam. Mut. Ins. Co., supra*. We examine these factors as they bear upon the reasonableness of KWS' attorney fees.

Timothy Dolan, one of KWS' attorneys, provided an affidavit which detailed the work that his law firm, including he and other legal staff, provided throughout the course of work on this case. Dolan represented that his firm began working on the case in August 2006 and corresponded with Firstar to negotiate a settlement; however, Firstar filed its complaint in December 2006. During litigation, the parties' counsel exchanged thousands of pages of documents during discovery and expended time to review those documents; conducted and attended numerous depositions of witnesses, some in Colorado which required travel; stipulated to 417 exhibits to be offered at trial and prepared many more exhibits as is reflected by the voluminous record in this case; conducted extensive legal research; argued motions in limine; and eventually conducted a 5-day jury trial. At one point, Firstar notified Dolan that among its damage claims Firstar would seek damages for gross lost revenue in an amount between $5 million and $15 million. According to Dolan, KWS incurred legal fees totaling $186,016.27 and billed costs such as copying, postage, deposition transcripts, and travel associated with the case totaling $11,394.08 for a total of $197,410.35 expended for fees and costs. Dolan provided the firm's invoices to the trial court for in camera review.

Firstar points to no evidence that the representations made by Dolan with regard to the time, fees, and costs represented by KWS are in any way inaccurate or misrepresented. Rather, Firstar argues that the vast majority of attorney time expended by KWS' attorneys would have been directed toward defending Firstar's claims against KWS for breach of contract and breach of various warranty claims under the UCC. KWS argues that it could not have recovered the $97,000 awarded by the jury verdict on its breach of contract claim unless it defended Firstar's claims in this action. Our review of this record leads us to believe that the claims were so intertwined that it is impossible to separate the fees incurred by KWS for defending the action

from those spent to recover on its counterclaim. Having reviewed the evidence submitted by KWS, we find no abuse of discretion in the trial court's award of attorney fees and costs in the amount of $197,410.35.

V. CONCLUSION

For the reasons stated above, we affirm the jury verdict with regard to breach of the Recycling Equipment Contract and Baler Line Conveyor Contract and also with regard to the breach of express and implied warranty claims and damages on both of those contracts. We also find no error in the trial court's decision to give jury instruction 14A, its denial of Firstar's motion for a new trial, or its award of attorney fees and costs to KWS in the amount of $197,410.35, and as such, we affirm.

AFFIRMED.